IN THE SUPREME COURT OF MISSOURI

CHERYL THRUSTON, et al.,	)	
	)	Supreme Court No. SC84624
Plaintiffs/Appellants,	)	
	)	
vs.	)	
	)	Appeal from the Circuit Court of Cole
JEFFERSON CITY SCHOOL DISTRICT,	)	County
	)	
Respondent.	)	Honorable Thomas J. Brown, III

APPELLANTS' REPLY BRIEF TO SUBSTITUTE BRIEF FOR RESPONDENT

Respectfully submitted,

BARTLEY, GOFFSTEIN, BOLLATO AND LANGE, L.L.C.

RONALD C. GLADNEY, No. 28160
JAMES R. KIMMEY III, No. 51148
4399 Laclede Avenue
St. Louis, Missouri 63108
(314) 531-1054 / (314) 531-1131 (Fax)

Attorneys for Plaintiffs/Appellants

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JURISDICTIONAL STATEMENT

This Appeal concerns whether the trial court properly granted Respondent Jefferson City School District's Motion to Dismiss Appellants' Petition. Appellants appealed the trial court's Judgment Order that sustained the Respondent's Motion to Dismiss. On May 14, 2002, the Missouri Court of Appeals dismissed the Appeal on grounds of mootness. Appellants filed an Application to Transfer the Appeal to this Court on July 16, 2002. This Court entered its Order granting Appellants' Application for Transfer on August 27, 2002. This Court has jurisdiction pursuant to Article 5, Section 10 of the Missouri Constitution.

STATEMENT OF FACTS

In addition to the Statement of Facts contained in Appellants' Brief before the Missouri Court of Appeals for the Western District, which Brief is now considered as Appellants' Brief before this Court, Appellants note Appellant Ward never had the opportunity to have her Grievance heard at all, in spite of her long tenure with the District. (Legal File 8-9, hereinafter "L.F.").

Similarly, Appellant Thruston's Grievance, collective bargaining and First Amendment rights were chilled through threats of job action, including the issuance of job targets by Respondent District. (L.F. 1-8).

Finally, Appellant Gifford's right to effectively represent employees in a collective bargaining context were also denied. The restoration of those rights is what is sought here and in the Appellants' prayers for relief. (L.F. 8, 10, 11).

POINT RELIED ON

I. THE TRIAL COURT DID NOT ERR IN REACHING THE MERITS OF THIS CASE BECAUSE THIS CASE IS A JUSTICIABLE CONTROVERSY:

(A) INJURIES AND DEPRIVATION OF RIGHTS TO ORGANIZE, PEACEABLY ASSEMBLE, PETITION AND SPEAK TO PUBLIC EMPLOYERS OVER TERMS OF EMPLOYMENT AND WORKING CONDITIONS WERE SUFFERED BY APPELLANTS AND HAVE NOT BEEN REDRESSED; AND

(B) THIS CONSTITUTIONAL CASE INVOLVING THE CHILLING OF THE EXERCISE OF BASIC RIGHTS UNDER ARTICLE 1, SECTION 9 OF THE MISSOURI CONSTITUTION AS WELL AS UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION REQUIRES A LIBERALIZED VIEW OF JUSTICIABILITY SO THAT THIS CASE IS JUSTICIABLE; AND

(C) EVEN IF THIS CASE WERE OTHERWISE MOOT, IT IS JUSTICIABLE UNDER THE CIRCUMSTANCES CONTAINED HEREIN SINCE IT INVOLVES FACTS OF GENERAL PUBLIC INTEREST, LIKELY TO RECUR, AND WHICH WOULD

OTHERWISE EVADE JUDICIAL REVIEW.

City of Springfield v. Clouse, 206 S.W.2d 539 (Mo. en banc 1947)

Owen v. City of Independence, 445 U.S. 622, 100 S.Ct. 1398 (1980)

Ruocchio v. United Transportation Union, 181 F.3d 376 (3d Cir. 1999)

Babbitt v. United Farm Workers National Union, 99 S.Ct. 2301, 101 LRRM 2428 (1979)

Article I Section 29 of the Missouri Constitution

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN REACHING THE MERITS OF THIS CASE BECAUSE THIS CASE IS A JUSTICIABLE CONTROVERSY:

(A) INJURIES AND DEPRIVATION OF RIGHTS TO ORGANIZE, PEACEABLY ASSEMBLE, PETITION AND SPEAK TO PUBLIC EMPLOYERS OVER TERMS OF EMPLOYMENT AND WORKING CONDITIONS WERE SUFFERED BY APPELLANTS AND HAVE NOT BEEN REDRESSED; AND

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OTHERWISE EVADE JUDICIAL REVIEW.

Standard of Review

As noted in the Brief of Appellants, the Standard of Review "is solely a test of the adequacy of the Plaintiffs' Petition." There is no attempt to weigh any facts and "instead the Petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or a cause of action that might be adopted in that case." Eastwood v. North Central Missouri Drug Task Force, 15 S.W.3d 65 (Mo.App. W.D. 2000); See also Magee v. Blue Ridge Professional Building, 821 S.W.2d 839 (Mo. en banc, 1991). This standard of review applies throughout the arguments contained herein.

A. Injuries and deprivation of rights to organize, peaceably assemble, petition and speak to public employers over terms of employment and working conditions were suffered by Appellants and have not been redressed.

Cheryl Thruston filed a Grievance under the School District's Grievance Policy concerning such basic matters as the lack of a teacher's aide, the lack of math books, segregation of her special needs children from other school activities including not allowing them to eat in the lunch room, and the general conditions under which her students had to be taught in the confines of a trailer. She immediately was threatened with job loss and bad performance ratings as she pursued her grievance with Luana Gifford as her representative through the District Grievance process. As such, her ability to peaceably assemble and speak before the public employer at a level above her immediate supervisor was significantly

chilled. Her ability to discuss her conditions of employment with her chosen representative, the President of the Missouri Federation of Teachers, was furthermore chilled. In fact, in its response to her initial grievance, the Jefferson City School District (hereinafter the "District") warned her "to refrain from discussing the children in her classroom with other people." (L.F. 3-7, and especially 7, 19).

Fern Ward's Grievance was not even heard by the District and was totally ignored. (L.F. 8-10). Luana Gifford's representational efforts were similarly thwarted. (L.F. 10-12).

Article 1, Section 29 of the Missouri Constitution grants unequivocally, and without limitation, a right which states "that employees shall have the right to organize and to bargain collectively through representatives of their own choosing." The attempts by the District to thwart the rights of Thruston and Ward, while still employees of the District to organize and bargain collectively through their chosen representative, Luana Gifford, through peaceful utilization of the District's own Grievance process, deprived Appellants of their rights under the Missouri Constitution as well as under the First Amendment of the United States Constitution. As such, the mere lapsing of Thruston's and Ward's contracts at the end of the school year did nothing to lessen the damage incurred while they were still employees. That damage had already occurred, an injury had already taken place, and even under City of Springfield v. Clouse, 206 S.W.2d 539 (Mo. en banc 1947), the rights of Appellants must be redressed.

While stating in broad terms that Article 1, Section 29 "does not apply to any public officers or employees" the Court in Clouse furthermore stated "this ruling does not mean ...

that public employees have no right to organize. All citizens have the right ... to peaceably assemble and organize for any proper purpose, to speak freely and to present their views and desires to any public officer or legislative body." 206 S.W.2d at 542. These are just the rights which were denied to Appellants. Appellants argue that these rights exist not only under the U.S. Constitution, but are amplified under the Missouri Constitution through Article 1, Section 29. They are rights to collectively bargain, not based on any contract of employment, but rather based on Constitutional principles. In a public employee context, those rights are not the same as in a private employee context and may not include the right to strike, or even the right to enter into a long-term binding collective bargaining agreement. But public employee collective bargaining rights include the right to grieve, to have those grievances heard fairly and impartially by someone not involved in the original determination or decision which led to the grievance, to organize and be represented in those matters involving terms and conditions of employment and to otherwise speak freely concerning these issues. In short, the rights of Appellants having been deprived, those rights not having been restored, and this lawsuit having been subsequently filed, Appellants seek redress. This case is not moot.

One may ask what redress is possible now for Appellants? The redress may consist of nothing more than directing the District to hear Appellants' grievances on matters which occurred while they were still employees and on grievances which were either not heard at all or the processing of which was chilled during their employment. As in Owen v. City of Independence, 445 U.S. 622, 100 S.Ct. 1398 (1980), Appellants' rights to pursue a grievance

under a public entity's grievance policy were effectively chilled and denied. Redress is appropriate.

In this case, as in Owen, by the time the litigation in question was filed, the individuals were no longer employees of the District. That is not the determinative fact. The determinative fact is that the Appellants were denied their grievance rights and their rights under the Missouri Constitution while in their status as employees. Furthermore, other District employees certainly have had the free expression of their collective bargaining rights chilled as a result of the District's mistreatment of Appellants.

B. This constitutional case involving the chilling of the exercise of basic rights under Article 1, Section 9 of the Missouri Constitution as well as under the First and Fourteenth Amendments to the U.S. Constitution requires a liberalized view of justiciability so that this case is justiciable.

The matter of justiciability, whether it be ripeness, mootness or standing is related. Especially where constitutional infringements are involved, a Court is likely to find an injury in fact and a justiciable case. This is especially true where First Amendment issues are involved. Virginia v. American Booksellers Association, 484 U.S. 383, 108 S.Ct. 636 (1988). As the U.S. Supreme Court noted in Lujan v. Defenders of Wildlife 504 U.S. 555, 112 S.Ct. 2130 (1992), in order to have a justiciable case and standing, a party must have an "injury in fact". 504 S.Ct. at 560-61. In this case, the three elements for a justiciable case have occurred in that Appellants have suffered an injury in fact, in that their right to collectively bargain through a representative of their own choosing has been thwarted by

Respondent District in either refusing to hear the Grievance at all, or in threatening termination of employment if a Grievance is effectively pursued.

The injury in question is actual, not conjectural or hypothetical and there is redress. While it is true that Thruston and Ward are no longer employed by the District, they may still gain the salutary effects of being represented by a bargaining representative in the grievance procedure to hear issues concerning their work conditions while employed. This will have a beneficial effect on others in the District who may be represented by Gifford or the Missouri Federation of Teachers. These issues, if resolved, will go a long way toward restoring the professional credibility of Thruston and Ward and may actually be beneficial to the District in terms of restructuring its classroom and personnel working conditions of employment. A justiciable case therefore exists which has not been mooted by the mere expiration of the employment contracts of Thruston and Ward.

The prayer of Thruston in her Petition that the Defendant District "be specifically directed to cease and desist" from said chilling of her rights, of Fern Ward, that the "Defendant School District be specifically directed to cease and desist from said abridgement" of her rights under the Missouri Constitution as well as the U.S. Constitution and of Plaintiff Gifford that her representational rights not be similarly thwarted state an effective relief for this Court to provide. (L.F. 8-11). Unlike Lujan, a justiciable case certainly exists here.

As the Supreme Court noted in Babbitt v. United Farm Workers National Union, 99 S.Ct. 2301, 101 LRRM 2428 (1979), the basic inquiry into determining justiciability is

whether the "conflicting contention of the parties ... present a real, substantial controversy between parties having adverse legal interest, a dispute definite and concrete, not hypothetical or abstract." 99 S.Ct. at 2308, citing and quoting Railway Mail Association v. Corsi, 326 U.S. 88, 65 S.Ct. 1483 (1945). When Plaintiffs do not claim to be threatened by unconstitutional conduct, no justiciable case exists. When, as here, however, the Appellants' rights to express themselves actually were chilled, such a justiciable case certainly exists. Otherwise, for many public employees who have no contractual right to employment at all, and who must rely solely on their constitutional protections, a case could always become moot merely by the employer terminating the employment status of the employee in question. In dealing with the mootness issue, which is essentially a justiciability issue, as the District Court noted in Deida v. City of Milwaukee, 192 F. Sup.2d 899 (2002), "the injury requirement is most loosely applied particularly in terms of how directly the injury must result from the challenged governmental action where First Amendment rights are involved." 192 F.Sup. at 904; quoting Ruocchio v. United Transportation Union, 181 F.3d 376, 385 (3d Cir. 1999). Where as here, the issue is not one of ripeness, but of mootness, the Appellants' fear of reprisal was not only objectively well founded, it actually occurred. Here, the deprivation of public employee collective bargaining rights directly impacted Appellants. As such, justiciability exists.

On the mootness side of the justiciability issue, Ruocchio, *supra*, is instructive. In that case, an individual claimed that his rights to free speech under the Labor Management Relations and Disclosure Act, which are similar to those contained under the First

Amendment to the U.S. Constitution, were tempered and chilled when, as a result of free speech activity he lost his position as Union Treasurer. Subsequently, the District Court dismissed the Complaint since he had been reinstated to his position and the District Court therefore claimed that the case was moot. The Court of Appeals reversed noting that this is a picture of an organization "employing a provision of its constitution to silence speech ..." 181 F.3d at 383. The same situation occurred here. The District implemented its grievance policy in such a manner as to silence the speech of any dissenting employees. Thruston's job was threatened and Ward's contract was not renewed after they pursued their grievance rights. As in Ruocchio, action taken against one person may deter others from exercising their rights, "thereby threatening the rights of all..." 181 F.3d at 384. The Third Circuit in Ruocchio correctly concluded that "cases addressing issues of standing in the free speech labor context -- which mirror the same concerns that exist regarding mootness -- have recognized that limitations on free speech can result in a 'chilling effect' on others' exercise of those rights, and have taken a broad view of standing based on this prospect." 181 F.3d at 385. See also Nelson v. International Association of Bridge, Structural and Ornamental Iron Workers, 630 F. Sup. 16 (D.C. District Court 1988).

C. Even if this case were otherwise moot, it is justiciable under the circumstances contained herein, since it involves facts of general public interest, likely to recur, and which would otherwise evade judicial review.

Missouri courts have recognized the concept that even when a case is otherwise moot, if it involves "a recurring unsettled legal issue of public interest and importance that will

escape review unless the Court exercises its discretionary jurisdiction" the case may be resolved. State ex rel. County of Jackson v. Missouri Public Service Commission, 985 S.W.2d 400, 403 (Mo. App. W.D. 1999). To say that a tenured teacher with continuing contract rights will protect the interests of other public employees including probationary teachers, many of whom have no contract rights and that the case will therefore arise in the future is simply not accurate. Tenured and untenured teachers do not have the same rights under the laws of the State of Missouri and it is unreasonable to assume that a tenured teacher would be deemed capable of raising the same claim as an untenured teacher. Even a brief review of the Missouri Teacher Tenure Act, Section 168.102, RSMo., *et seq*., reveals the glaring differences between the rights of tenured and non-tenured teachers. The Act, for example, limits the matter in which a permanent teacher's contract can be modified or terminated, but this is not the case with respect to a probationary teacher. The Act limits the circumstances in which a district can terminate the indefinite contract of a permanent teacher, but does not so limit termination for probationary teachers. To say that a tenured teacher, with the panoply of rights just described may pursue a claim similar to that of a probationary teacher or of any other public employee without such contractual protection is simply inconsistent with Missouri law.

Where, as here, an issue of extreme public importance exists in terms of a fresh look at Article 1, Section 29 of the Missouri Constitution and the rights it affords public employees, and where, as here, Appellants had their rights thwarted, a justiciable controversy exists. Even if the case were moot, which it is not, the protections of probationary teachers

and of any other public employee, without a contractual right could evade review by merely having the public employer terminate the employment in question. Under such circumstances, even if a strict analysis concluded that this case is not, which it should not, the doctrine of justiciability, especially as applied to First Amendment related issues should apply and the Court should hear this case in accordance with the precepts of State ex rel. County of Jackson, *supra*.

As Justice Douglas noted in his stirring dissent in Broadrick v. State of Oklahoma, 413 U.S. 601, 93 S.Ct. 2908 (1973), with respect to limitations on the rights of public employees to assert themselves:

> These people are scrub women, janitors, typists, file clerks, chauffeurs, messengers, nurses, orderlies, policemen and policewomen, night watchmen, telephone and elevator operators, as well as those doing some kind of administrative, executive or judicial work. ... A bureaucracy that is alert, vigilant, and alive is more efficient than one that is quiet and submissive. It is the First Amendment that makes it alert, vigilant and alive. It is suppression of First Amendment Rights that creates faceless, nameless bureaucrats who are inert in their localities and submissive to some master's voice. I would not allow the bureaucracy in the State or Federal government to be deprived of First Amendment rights. Their exercise certainly is

> as important in the public sector as it is in the private sector. Those who work for government have no watered down constitutional rights. So far as the First Amendment goes, I would keep them on the same plane as all other people.

This is precisely the concept viewed by our Missouri constitutional framers in Article 1, Section 29. The City of Springfield v. Clouse, *supra*., may stand for the proposition that binding collective bargaining agreements which restrict legitimate legislative appropriating authority cannot be entered into absent state statutory action. Furthermore, while there may be no right to strike for public employees, there is certainly a right to collectively bargain in the context of negotiating over terms and conditions of employment while exercising the right to organize, peaceably assemble, and express collective views.

CONCLUSION

For the above-stated reasons and law, it is respectfully submitted that the Circuit Court was correct in deciding this case on the merits, but incorrectly failed to protect the rights of Appellants. It is respectfully requested that this Court find this case on the merits on behalf of the Appellants.

Respectfully submitted,

BARTLEY, GOFFSTEIN, BOLLATO AND LANGE, L.L.C.

RONALD C. GLADNEY, No. 28160
JAMES R. KIMMEY III, No. 51148
4399 Laclede Avenue
St. Louis, Missouri 63108
(314) 531-1054 / (314) 531-1131 (Fax)

Attorneys for Plaintiffs/Appellants

CERTIFICATE OF COMPLIANCE

COMES NOW Ronald C. Gladney, attorney for Appellants, and submits his Certificate stating as follows:

1. I, Ronald C. Gladney, attorney for the Appellants in the above-styled matter state that my address is 4399 Laclede Avenue, St. Louis, Missouri 63108, Missouri Bar No. 28160, and telephone number 314-531-1054.

2. The Brief filed herewith in the above-styled matter complies with the limitations contained in Rule 84.06(b), Missouri Rules of Civil Procedure and said Brief contains 3,572 words of monospaced type in the Brief.

3. A floppy disk is filed herewith which has been scanned for viruses and is virus-free to the knowledge of the undersigned. Floppy disk versions of the Brief have been transmitted to all opposing counsel as well.

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RONALD C. GLADNEY

CERTIFICATE OF SERVICE

Two copies of the foregoing "Appellants' Reply Brief to Substitute Brief of Respondent" were served on Tom Mickes, Esq., and Paul Reckenberg, Esq., Doster James, L.L.C., 17107 Chesterfield Airport Road, Suite 320, Chesterfield, Missouri 63005; and to Thomas C. Welsh, Esq., Gerard T. Carmody, Esq., and Elizabeth C. Carver, Esq., Bryan Cave, L.L.P., One Metropolitan Square, 211 North Broadway, Suite 3600, St. Louis, Missouri 63102; and to Johnny K. Richardson, Esq., Brydon, Swearengen and England, 312 East Capitol Avenue, Jefferson City, Missouri 65101, Counsel and Co-counsel for Defendant/Respondent Jefferson City School District, by placing same, postage prepaid, in the U.S. Mails, this_____ day of _____, 2002.

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